85-1391

Docket No. _____

SUPREME COURT, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1985

JAMES D. SULLIVAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Counsel For Petitioner

Barry Hess
Richard M. Crump
301 St. Joseph Street
Post Office Box 1706
Mobile, Alabama 36633
1-205-432-4546

8 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL REQUIRE THAT THIS COURT ESTABLISH LIMITS BEYOND WHICH THE PROSECUTION CAN NOT GO IN SEEKING TO GAIN THE COOPERATION OF A WITNESS.

II. WHETHER PETITIONER, JAMES D. SULLIVAN, WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BECAUSE OF THE TRIAL COURT'S FAILURE TO GRANT AN EVIDENTIARY HEARING ON THE ISSUE OF PROSECUTORIAL MISCONDUCT.

III. WHETHER THE PROSECUTION OF A STATE COURT JUDGE FOR THE UNITED STATES GOVERNMENT IS VIOLITIVE OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF INTERESTED PARTIES

The Defendants in the original criminal proceedings in the District Court for the Southern District of Alabama were Willis Holloway, Elwood Hogan, Petitioner, Durwood Elliott and Thomas Withers. Billy Broadus, was indicted along with the above-named defendants but was tried separately.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, James D. Sullivan, by and through his attorneys of record, prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which judgment was entered on or about December 16, 1985.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is attached hereto in the Appendix as Exhibit A.

STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.S. Section 1254(1) (1977). Petitioner having been convicted of a criminal offense in the United States District Court for the Southern District of Alabama and his conviction having been affirmed by the United States Court of Appeals for the Eleventh Circuit on December 16, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Tenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, James D. Sullivan, a Judge in the District Court of Mobile County, Alabama, was indicted along with several other persons by the November, 1983, Federal Grand Jury and charged in count one with a substantive RICO violation and under count two with conspiracy to violate the RICO statute, in violation of 18 U.S.C.S. Section 1961 et.seq., (1979). (C.R. 498-538) Petitioner was arraigned on November 10, 1983, and, pursuant to the order on arraignment, filed various pre-trial motions. (C.R. 541) Among the pre-trial motions filed by Petitioner was a motion to dismiss the indictment due to obstruction of justice and in this motion, Petitioner set out allegations of prosecutorial misconduct including the harassment and threatening of certain persons who appeared before the Grand Jury. (C.R.

561-569) On December 30, 1983, the trial Judge entered an order requiring that the movant (Petitioner herein) file and serve affidavits and/or discovery materials in support of the factual allegations concerning the threatening and harassment of witnesses within ten days and further ordered that the movant and the Government file and serve briefs addressing the issue of whether a dismissal of the indictment was an appropriate remedy for the misconduct alleged or whether an evidentiary hearing should be held addressing the factual issues. (C.R. 631-632) Petitioner thereafter timely filed the affidavit of Melvin W. Brunson (C.R. 642), the affidavit of Barry Hess (C.R. 643-645), the affidavit of Gary Steven McCarver (C.R. 701-702), the affidavit of Samuel Robert Greene, III (C.R. 703-704), the affidavit of Frank Parker (C.R. 705-706), and the affidavit of affidavit of Joyce Chapman (C.R. 707-708) The

test of the affidavits are fully set out in the appendix attached hereto however, most dealt with threats made by the United States that the affiant would be prosecuted if he did not cooperate in the investigation of Petitioner and others. After determining that an evidentiary hearing was not necessary and that the Petitioner had failed to prove any prejudice flowing from the prosecutorial misconduct, the trial Court denied the motion to dismiss and denied Petitioner's request for an evidentiary hearing. (C.R. 725-728)

Petitioner's trial commenced on February 13, 1984 and continued through March 30, 1984 when the jury returned a verdict against Petitioner of guilty as charged in count one and count two of the indictment. On April 30, 1984, the trial Court denied Petitioner's post-trial motions for judgment of acquittal based on the Tenth Amendment and on May 4, 1984, Petitioner

was sentenced under count one to imprisonment for a period of twenty years and a fine of $5,000 and under count two to imprisonment for a period of twenty years to run concurrently with the sentence imposed in count one. (C.R. 781-784) Petitioner timely filed his notice of appeal to the United States Court of Appeals for the Eleventh Circuit and in an opinion issued December 16, 1985, that Court affirmed Petitioner's conviction concluding that the facts before the trial Court were neither sufficient to cause the Court to dismiss the indictment nor to have an evidentiary hearing on that issue and noting that it could find no case which draws the outer limits beyond which the prosecution may not go in seeking the cooperation of prospective witnesses either before a grand jury or for trial. The Eleventh Circuit did not address Petitioner's Tenth Amendment claim. Petitioner thereafter filed

the instant petition for certiorari before this Honorable Court.

ARGUMENT

I. PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL REQUIRE THAT THIS COURT ESTABLISH LIMITS BEYOND WHICH THE PROSECUTION CAN NOT GO IN SEEKING TO GAIN THE COOPERATION OF A WITNESS.

One of the issues raised by Petitioner in his appeal before the United States Court of Appeals for the Eleventh Circuit was that the Government had committed misconduct of such an extreme nature that the indictment should have been dismissed. United States v. Holloway, et. al., Appendix A. In support of his contention, Petitioner submitted affidavits of several persons all of whom stated, in essence, that they were threatened with prosecution if they did not cooperate with the Government. See, Appendix B. Calling the affidavits conclusory, the Eleventh Circuit condoned these actions and

declined to set limits on how far the prosecution could go in seeking the "cooperation" of prospective witnesses. Because of the important constitutional issues involved and because this appears to be a case of first impression, Petitioner asserts that this issue should be addressed and decided by this Court.

There can be no disagreement with the proposition that an indictment and conviction obtained by means repugnant to the Constitution and the notions of fundamental fairness must be reversed. Rochin v. California, 342 U.S. 165 (1952). In his dissenting opinion in Irvine v. California, 347 U.S. 128 (1954), Justice Frankfurter, quoting from Malinski v. New York, 324 U.S. 401, stated:

> "Regard for the requirements of the due process clause 'inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English

> speaking peoples even toward those charged with the most heinous offenses'". Irvine v. California, 347 U.S. at 145.

The question thus becomes not whether some restriction should be placed on the prosecution, in that such restrictions exist, i.e., the prosecution may not obtain an indictment or conviction by the knowing use of perjured testimony nor may it use a confession coerced from a defendant. Mesarosh v. U.S., 352 U.S. 1 (1956); Roshin, supra. The question is instead, how far may the prosecution go in seeking to obtain the "cooperation" of a witness while still being within the confines of due process and fundamental fairness. While this outer limit may be elusive and must, of necessity, be decided on a case-by-case basis, the Petitioner asserts that it is certainly beyond the boundaries of fundamental fairness and due process for the Government to seek to gain the "cooperation" of a witness by

threatening that witness with prosecution if he or she fails to cooperate.

In the instant case, the affidavits tendered by Petitioner clearly illustrate that the prosecution stepped beyond the boundaries of fairness and due process in seeking the cooperation of these witnesses. Gary Steven McCarver was accused by an FBI agent of bribing a Judge and told that if he denied this he would be prosecuted for perjury but that if he "cooperated" nothing would happen. See, Appendix B. Similarly, Samuel Robert Greene, III, was accused by an FBI agent of paying to have a criminal case pending against him fixed and was threatened with prosecution for bribery and perjury if he did not cooperate with the Government but was told that nothing would happen to him if he "told the grand jury what he [the FBI agent] told me to say." See, Appendix B. Similar affidavits were submitted by Joyce

Chapman and Frank Parker. See, Appendix B. Although these actions were characterized by the Eleventh Circuit Court of Appeals as "permissible notice" that the prosecutor could proceed against a witness, the underlying message was abundantly clear - tell us what we want to hear or be prosecuted. Certainly, this goes far beyond normal plea bargaining which is routinely engaged in by prosecutors and the potential for abuse in such a situation is readily apparent. Not only can it encourage perjury, but it also seriously undermines the integrity of the judicial system. This is so even in the absence of prejudice to the defendant because, as the Ninth Circuit quoting Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928), stated:

> "...[T]he principal is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; ...to promote

> confidence in the administration of justice; ...to preserve the judicial process from contamination; ...Our government is the potent, the omni present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law that end justifies means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution.'" McCord v. U.S., 509 F.2d 334, 350 (D.C. Circuit 1974).

Finally, it is clear that in Federal criminal prosecutions, the Constitution guarantees the right to an indictment by an unbiased grand jury and this necessarily pre-supposes an investigative body acting independently of either the prosecuting attorney or a Judge. United States v. Dionisio, 410 U.S. 1 (1973). Although the Grand Jury's historic role has been to serve as a guardian between the ordinary citizen and the

over-zealous prosecutor, the reality that Grand Jury proceedings are secret, ex parte and largely under the control of the Federal prosecutor magnifies the concern that the Grand Jury may be over reached by the manipulations of the prosecutor. Dionisi, 410 U.S. at 17; see also, United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979). Because of these concerns, Petitioner asserts that boundaries should be drawn so as to insure that the prosecutor, in his zeal, will not step beyond the limits of due process and fundamental fairness in seeking to obtain the cooperation of a witness and Petitioner prays that this Honorable Court will hold that threats of prosecution by the Government if a witness does not cooperate falls outside of these boundaries and is therefor, a denial of Petitioner's constitutional rights to fundamental fairness and due process.

II. PETITIONER, JAMES D. SULLIVAN, WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS

BY THE TRIAL COURT'S FAILURE TO GRANT HIM AN EVIDENTIARY HEARING ON THE ISSUE OF PROSECUTORIAL MISCONDUCT.

One of the componen parts of the constitutional right to due process is the right to notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67 (1972). As regards an evidentiary hearing, it is clear that such a hearing is required when the moving papers allege facts with sufficient definiteness, clarity and specificity to enable the trial Court to conclude that relief must be granted if the facts alleged are proved. United States v. Carrion, 463 F.2d 704 (9th Cir. 1972); see also, United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980). Both the trial Court and the Eleventh Circuit determined that an evidentiary hearing was not necessary and in determining whether these conclusions were

justified this Court must assume the factual allegations in Petitioner's affidavits are true. Irwin, 612 F.2d at 1187.

As set out in the preceding argument, the affidavits submitted by Petitioner set out in detail the misconduct on the part of the United States and specifically that the United States threatened witnesses with prosecution if they did not cooperate in the investigation and say what the Government wanted them to say. See, Appendix B. Clearly, Petitioner has set out with the required definiteness, clarity and specificity the facts and the next question becomes whether, under the facts, relief must be provided. This question clearly must be answered in the affirmative because not only are these actions by the United States repugnant to the notions of fundamental fairness and due process but they come dangerously close to subornation of perjury or the knowing use of

perjured testimony. Clearly, if this be the case, the Petitioner is entitled to relief. See, Mesarosh and Roshin, supra. Clearly, Petitioner made the required predicate showing and was entitled to an evidentiary hearing to fully explore the extent, nature and consequences of the threats made not only to the witnesses who provided affidavits but to any other witness who may have been subject to the same type of treatment. Because Petitioner made the required showing but was denied an evidentiary hearing, he submits that he was denied his right to due process and urges this Honorable Court to remand the instant case with instructions that Petitioner be given an evidentiary hearing on the issue of prosecutorial misconduct.

III. THE PROSECUTION OF A STATE COURT JUDGE BY THE UNITED STATES GOVERNMENT IS VIOLITIVE OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his motion for judgment of acquittal, Petitioner assigned several grounds including that the prosecution of a State Court Judge by Federal authorities was violitive of the Tenth Amendment. (C.R. 775) This motion was denied by the trial Judge and the Eleventh Circuit did not address the issue on appeal. Petitioner asserts that under the facts in the instant case, his prosecution by Federal authorities is violitive of the Tenth Amendment.

The Tenth Amendment to the United States Constitution states in pertinent part:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." United States Constitution, Tenth Amendment.

It has been held that among the powers reserved to this State was the power to create, maintain and regulate a State judicial system. Atlantic C.L.R. Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970);

Missouri v. Lewis, 101 U.S. 22 (1880). Petitioner contends that the Tenth Amendment specifically grants to the State the exclusive right to create and police a State judicial system, including the Judges of that system and that the prosecution of Petitioner, a State Court Judge, by Federal authorities, is violitive of the Tenth Amendment. Clearly, this is an area exclusively reserved to the States.

This Court has attempted on several occasions to define when a congressional exercise of power violates the Tenth Amendment and it is clear from the opinions that a hard and fast rule can not be laid down. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. __, 83 L.Ed.2d 1016 (1985), and the cases cited therein; National League of Cities v. Usery, 426 U.S. 833 (1976). The thrust of these opinions indicates that this decision will be made on a case-by-case basis by weighing the

source of the congressional power and the legitimacy of its exercise against the degree of interference with the State's sovereignty and Petitioner asserts that when this weighing test is performed, it is clear that the legitimate exercise of the Federal criminal law is far outweighed by the substantial interference with the State of Alabama's Judicial system and is thus destructive of the State's sovereignty violitive of the Tenth Amendment.

In 1972, Amendment 317 to the Alabama Constitution was ratified which set up a judicial commission empowered to investigate Judges and make recommendations to the Alabama Supreme Court regarding, among other things, discipline and removal of Judges from office. Const. of Ala. at 317. In 1973, Amendment 328 to the Constitution, commonly referred to as the new judicial article, was ratified. Const. of Ala. Amendment 328. This amendment repealed

Amendment 317 and set out in much greater detail procedures surrounding the policing of the Judical system including the disciplining of Judges and the removal of Judges from office. This amendment established a Judicial inquiry commission which was given the authority to conduct investigations, receive or initiate complaints concerning any Judge and file complaints with the court of the judiciary. Const. of Ala. Amendment 328, Section 6.17(b). Also established under Amendment 328 was the court of the judiciary which had the authority to discipline Judges and remove them from office. Const. of Ala. Amendment 328, Section 6.18(a). It is apparent that the intent of the State of Alabama in adopting Amendment 328 and its predecessor, Amendment 317, was to provide a uniform and orderly aparatus by which the State Judicial system could be policed and complaints against, and the removal from office of Judges

was to be handled. Petitioner asserts that this very legitimate State's function is interfered with by the prosecution in Federal Court of State Court Judges for crimes alleged to have been committed on the bench to the point that it is destructive of State sovereignty. Petitioner asserts that the State's interest in maintaining an independent judiciary, providing a uniform and orderly aparatus by which to police its judiciary far outweighs the Federal Government's interest in prosecuting a State Court Judge. Although this determination, of necessity, must be made on a case-by-case basis, Petitioner asserts that in the instant case, factors weigh heavily in favor of the State and against the exercise of Federal jurisdiction in this case and, therefor, Petitioner asserts that his prosecution in the Federal Courts is barred by the Tenth Amendment to the Constitution. Accordingly, Petitioner prays that this

Honorable Court will grant his writ and will reverse his conviction.

CONCLUSION

From the foregoing, it is clear that the indictment and conviction in the instant case were obtained by means violitive of Petitioner's constitutional right to due process and a fair trial and so repugnant to the notion of fundamental fairness that the Petitioner's conviction is due to be reversed. As stated by Justice Frankfurter:

> "This court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained..." Irvin v. California, 347 U.S. 128 (1954); (Frankfurter, J., dissenting).

Because of the methods employed by the prosecution in the instant case, Petitioner asserts that the granting of this Petition is required. Accordingly, the Petitioner respectfully prays that this Honorable Court

will, for the reasons and based on the authority set out herein, grant his Petition for Writ of Certiorari to the Eleventh Circuit and will reverse the decision contained therein.

Respectfully submitted,

HESS, ATCHISON & HORNE

BY: _____
BARRY HESS

BY: _____
RICHARD M. CRUMP
ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I, Barry Hess, a member of the Bar of the United States Supreme Court and attorney for the Petitioner, do hereby certify that on the 14 day of February, 1986, I did serve the requisite number of copies of the foregoing to the Clerk of the Supreme Court and the U.S. Attorney for the Southern District of Alabama, the Hon. J. B. Sessions, III, by placing a copy of the same in the United States mail, properly addressed and first class postage prepaid.

BARRY HESS

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, a notary public in and for said State and County, Barry Hess, who being by me first duly sworn, acknowledged before me on this day that being informed of the contents of the foregoing, he signed the same voluntarily on this the 14 day of February, 1986.

Mary Beacon Stockman
NOTARY PUBLIC,
STATE OF ALABAMA

APPENDIX A

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

VS.

WILLIS WALTER HOLLOWAY, JR., ELWOOD
L. HOGAN, JAMES D. SULLIVAN,
DEFENDANTS-APPELLANTS,

NO. 84-7321

United States Court of Appeals,
Eleventh Circuit

Dec. 16, 1985

Defendants were convicted in the United States District Court for the Southern District of Alabama, Emmett Ripley Cox, J., of having participated in a scheme to obtain favorable treatment for certain accused persons in cases pending before two state judges, and they appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) dismissal of indictment was not warranted for alleged threats to and harassment of prospective grand jury

witnesses by the prosecution, and (2) evidentiary hearing was not required on the motion to dismiss the indictment on such ground.

Affirmed.

Appeals from the United States District Court for the Southern District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Appellants are two former state court judges of Mobile County, Alabama and a lawyer who is alleged to have participated with them in receiving bribes for favorable treatment to certain accused persons in cases pending before the two judges.

The evidence is overwhelming as to the guilt of the two judges and participation in the scheme by the lawyer. Two other defendants did not appeal. 1 The appellants make no contention here that the evidence was insufficient to

support their contention and they make no complaint as to the sentences although the two judges received 20 year sentences.

The evidence showed that there was a team of six or seven persons including Holloway, the lawyer, three of whom were co-defendants who have not appealed, who are shown to have held out to several persons under indictment in the state courts the ability of certain members of the tem to obtain favorable treatment at the hands of Judges Sullivan and Hogan in return for cash payments.

I. ISSUES ON APPEAL

The grounds of appeal asserted by the appellants are as follows:

I. Whether the trial court erred in denying the appellants' motion to dismiss the indictment.

II. Whether the trial court erred in not holding an evidentiary hearing regarding

appellants Holloway and Sullivan's motion to dismiss the indictment.

III. Whether the trial court abused its discretion in denuing appellant Sullivan's motion for severance.

IV. Whether the prosecution of a state court judge violates the Tenth Amendment to the United States Constitution.

V. Whether the trial court erred in excluding testimony by attorney Robert F. Clark concerning alleged prior inconsistent statements of his client, Lester Pugh.

VI. Whether the agreement between Lester Pugh and the government violated the appellant Hogan's Fifth Amendment rights.

We consider that only the first two grounds merit discussion by this Court.

II. DISCUSSION

The first two of the above issues deal with

the allegations made by the appellants that the trial court erred in denying their motion to dismiss the indictment because they allege that several prospective grand jury witnesses were threatened and harassed by the prosecution to the extent that this amounted to prosecutorial misconduct of a kind that warranted a dismissal of the indictment.

[1] The law dealing with this particular issue makes it plain that if a sufficiently egregious case of prosecutorial misconduct is shown, this Court has the inherent power to direct the indictment to be dismissed. United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983). In Pabian, the Court stated that the dismissal of an indictment on such grounds is an "extreme sanction which should be infrequently utilized." Id. at 1536.

Pabian said:

> Although the federal judiciary

> exercises a supervisory role over federal grand juries, that role must be informed by recognition that dismissal of an indictment for prosecutorial miscoduct is an "extreme sanction which should be infrequently utilized." United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978)

704 F.2d at 1536.

The government contends that there was no prosecutorial misconduct in this case. It also contends that even though there had been the indictment should not be dismissed without a showing of prejudice to the defendants. That represents the holding of the Court of Appeals for the Fifth Circuit in United States v.McKenzie, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982). 2 Ini McKenzie, the Court held that: "Whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed only where the

defendant's case has been unfairly prejudiced." 678 F.2d at 631.

The question whether the district court ever may, in exercise of its supervisory authority over the grand jury, dismiss an indictment absent a showing of prejudice to the defendant was not reached by this Court in Pabian, although the issue was spelled out. It became unnecessary because the Court in that case found that there had been no prosecutorial misconduct.

The appellant's argument that this Court should require a dismissal of the indictment on account of egregious prosecutorial misconduct is based on the theory that prospective witnesses, all of whom were suspected by the government to have committed some offense, were told by the government agents that their testimony was desired before the grand jury in this case and that the government was in a position to help

them if they cooperated, and, correspondingly, was in a position to hurt them if they failed to cooperate. In order to have before it the actual facts as to what was said by way of threats, the trial court required the defendants to file affidaits from such prospective witneses as they saw fit to support their contention. Affidavits were received from the following prospective grand jury witnesses:

1. Joyce Chapman

She testified that she was the wife of Calvin Chapman and that she was "contacted by FBI agent Christian, a female."

She told me that she understood that I had been arrested within the last several weeks. She told me that "we are responsible for having those charges brought up against you." The charges concerned the case that I had been a defendant in that had been nol prossed in 1981. She also told me that she could help me or hurt

me on those charges and help or hurt my husband. She said she wanted some information on Judge Hogan and Mr. Holloways making a deal with my husband to pay $10,000 to give him probation.

I told her that there was no information that I could give her, that I did not know of any kind of deal. I told her I could not make up any lies to help myself. She kept repeating that she could help me on my cases. She kept telling me that I was lying. I told her "well, just a little blackmail to hold over my head," She then left...

I was also subpoenaed to appear as a witness before the Grand Jury and was that that I would be prosecuted for perjury if they could prove that I lied. I took this as a threat implying that I should say what they wanted me to say.

Joyce Chapman did not appear as a witness before the grand jury.

2. Thomas M. Withers

Withers' affidavit made no mention of any threat by the FBI or any other investigator. He was one of the defendants.

3. Frank Parker

I am Frank Parker and I operate a business at 5721 Old Rock Road, Mobile, Alabama. I have been interviewed by FBI agent McFadden. He told me that he had evidence that I had paid money to Dodson Fail to fix a criminal case pending against Gary McCarver. He threatened me with prosecution for bribing a state judge and with prosecution for lying to a Federal Grand Jury if I did not cooperate with him. These allegations were not true and I ordered him to leave my place of business.

Frank Parker testified before the grand jury but he does not now allege that he gave any untruthful statement.

4. Samuel Robert Greene, III

I am Samuel Robert Greene, III. I have been interviewed by FBI agent McFadden at my home at 954 Palmetto Street, Mobile, Alabama. Agent McFadden told me that I had paid $6,000 to fix a case in which I was a defendant in state court. He further told me that he would revoke my probation and charge me with bribing a state judge and perjury before a Federal Grand Jury if I did not cooperate, but nothing would happen to me if I told the Grand Jury what he told me to say.

Greene testified before the grand jury but he does not allege that he was coerced into telling any falsehood.

5. Gary Steven McCarver

I was on probation in state court for an assault conviction and had a new charge for assault. I was interviewed by FBI agent McFadden who accused me of paying money for

fixing my pending case of assault. He threatened me with prosecution for bribing a state judge and for lying to a Federal Grand Jury if I denied this. He told me nothing would happen to me if I cooperated. I did not pay any money to fix my case.

I told the United States Attorney, Jeff Sessions, that I did not have "a sure thing" in my case. I told him this after he had shown me a statement written by McFadden that was not correct. Mr. Sessions gave me a disgusted look and told me that I had better tell the Grand Jury the truth.

McCarver testified before the grand jury but did not claim to have been overpowered into testifying to any falsehood.

[2] In addition to the above affidavits, affidavits were filed by two lawyers. Both stated that their clients had told them of circumstances that they considered to be threats

either by the FBI or by the United States attorney's office. These affidavits, of course, did not subject the prospective witness to prosecution for perjury if their statements were proved to be false. Therefor, they cannot be considered as responding to the court's order, requiring proof "by affidavit or discovery material" as to the alleged government threats.

[3,4] Thus, it appears that not a single prospective witness before the grand jury contended in his or her affidavit that the so-called "threats" by the government officials had caused him to testify falsely before that body. Moreover,the affidavits contained statements that are largely conclusory, rather than being an actual quotation of the statements made to the prospective witnesses by the prosecution. We disregard the affidavit of Joyce Chapman, because she did not testify before the grand jury at all. As noted above,

Withers' affidavit made no mention of any threat. As to Frank Parker, his affidavit stated: "He threatened me with prosecution for bribing a state judge and with prosecution for lying to a federal grand jury if I did not cooperate with him." We do not have the language which Parker construed as a "threat" of prosecution. There could be nothing wrong in McFadden's telling Parker that he would be subject to prosecution for "lying to a federal grand jury," regardless of whether he cooperated with McFadden or not. Greene's affidavit did not give us the language which he claimed McFadden used from which he got the impression that McFadden "would revoke my probation and charge me with bribing a state judge," both state matters, nor is there any suggestion in his affidavit that McFadden "told" him to say anything that was not true. Finally, McCarver's affidavit doesn't seem to us to say anything

objectionable. The bottom line of this affidavit is: "He threatened me with prosecution for bribing a state judge and for lying to a Federal Grand Jury if I denied this. He told me nothing would happen to me if I cooperated." This statement is a form of permissible notice that the prosecutor could proceed against the witness unless he cooperated as a witness for the government and that he would be prosecuted for perjury if he lied. Besides, the affidait does not include the words used to him by agent McFadden which he construed as being "a threat."

Appellants cite no case which draws the outer limits beyond which the prosecution may not go in seeking the cooperation of prospective witnesses either before a grand jury or for trial, and we have found none. Appellant Sullivan's bri deals with this matter as follows:

> Although in most instances cases of prosecutorial misconduct have involved the knowing use of perjured testimony and entrapment of the defendant by law enforcement officers, defendant has found no case which limits prosecutorial misconduct such that would require dismissing an indictment to the above situations.

Appellant's Brief, p. 17. Neither has defendant found a case which provides the limits beyond which the government cannot go in seeking cooperation of a witness.

[5] We take it to be self evident that, so long as it is made known to a defendant in the criminal prosecution, the government may agree not to prosecute a prospective witness if he or she agrees to testify "for" the government. This policy seems thoroughly approved by the Supreme Court in its opinion in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972):

> We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The

> heart of the matter is that one assistant United States attorney - the first one who dealt with Taliento - now states that he promised to Taliento that he would not be prosecuted if he cooperated with the Government. (Emphasis added.)

Id. at 153, 92 S.Ct. at 765. The Court did not criticize this action by the assistant U. S. Attorney. The Court held that the prosecution ws required to notify the defendant of this agreement. The question remains how far may be prosecution to in obtaining such "cooperation"

[6,7] Partially because no witness testified that he was coerced to giving any evidence before the grand jury that was not true and partially because the affidavits given by the prospective witnesses were largely conclusory in their language, rather than expressly stating facts from which the court could determine that they were actually intimidated, we conclude that the facts before the trial court were neither sufficient to cause

the court to dismiss the indictment nor to have a hearing on that issue. The government concedes in its brief that the prevalent rule as to the showing required to entitle a defendant to a hearing on a charge of prosecutorial misconduct is that if defendants "raise a material fact which, if resolved in accordance with the defendant's contentions, would entitle them to relief, they would be entitled to a hearing." Gov.Br., pp. 85, 86, citing U. S. v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980).

After stating that the "defendant has made no showing by affidavit or otherwise, that the alleged misconduct is prejudicial to the defendant," the Court also said: "The facts presented by the defendant, even if assumed to be true, do not constitute misconduct which warrants dismissal of the indictment." The Court also noted the important fact that all of the witnesses before the grand jury were

available for cross-examination as to this precise question during the trial. Noticeably, very little effort was made at the trial to prove the truth of the contention that any of the witnesses had been intimidated.

As we did in the Pabian cae, we hold that there was no showing of prosecutorial misconduct in this case. It is, therefor, unnecessary for us to determine "whether a district court ever may, in exercise of its supervisory authority over the grand jury, dismiss an indictment absent a showing of prejudice to the defendant." United States v. Pabian, supra, at p. 1540.

There is authority for both positions on this issue. As noted above, the Court of Appeals for the Fifth Circuit in United States v. McKenzie, supra, held that "whether the court is acting under its supervisor authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed

only where the defendant's case has been unfairly prejudiced." 678 F.2d at 631.

Contrariwise, the Court of Appeals for the Third Circuit in United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), has held that dismissal of an indictment in exercise of the supervisory power may be an appropriate remedy to correct flagrant prosecutorial misconduct despite the absence of prejudice to the defendant. See Serubo, 604 F.2d at 817. We follow the precept of the Pabian case: "We save that issue for another day." 704 F.2d at 1540.

The judgments are AFFIRMED.

APPENDIX B

AFFIDAVIT OF MELVIN W. BRUNSON

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me the undersigned authority in and for said State and County Melvin W. Brunson who after being duly sworn deposes and says as follows:

My name is Melvin W. Brunson and I am a practicing attorney in the City of Mobile, Mobile County, Alabama. In the course of my practice of law, I represented Albert Pugh on an occasion when he appeared before a United States Grand Jury in December, 1983.

Prior to Mr. Pugh actually appearing before the Grand Jury and testifying, I was asked, as his attorney, by the U.S. Attorney, Jeff Sessions, if I would be willing to discuss Mr. Pugh's testimony before the Grand Jury. I stated that I would and I had a conversation with Mr. Sessions and two members of his staff,

a female assistant U.S. Attorney and apparently an investigator for the U. S. Attorney's office. Basicially, I was told why Mr. Pugh had been subpoenaed to testify before the Grand Jury and the fact that the U. S. Attorney's office felt that Mr. Pugh had knowledge. I was told that the U.S. Attorney's office knew that Mr. Pugh had participated in a scheme with Willis Holloway to set up a witness, I believe named Carl Smith, in order that he would be arrested on a drug chage. This would discredit Carl Smith and his testimony at any trial against Willis Holloway, James Sullivan, Elwood Hogan and other co-defendants. I was also told by the U.S. Attorney's office that Mr. Pugh was a known drug dealer and that the U.S. Attorney's office had good drug cases against him which it could initiate. However, they were not interested in prosecuting him at the present time if he would be willing to testify before the Grand Jury of

his participation in the scheme with Willis Holloway to set up Carl Smith.

After these discussions with the U.S. Attorney and his staff, I related such discussions to Albert Pugh. He stated to me that he knew nothing about what the U.S. Attorney's office was claiming. He disclaimed any dealing in drugs or any use of drugs and that if the U.S. Attorney's office had what they considered cases against him that they would simply have to bring them. He stated that he feared that the U.S. Attorney's office would attempt to prosecute him but that he would not agree to testify before the Grand Jury as to something that was not true.

After these discussions Mr. Pugh went before the Grand Jury and testified for a short period of time and then came out of the Grand Jury room statinrg that he was going to refuse to testify further. At that time we left the United States Federal Building.

/s/_____
MELVIN BRUNSON

AFFIDAVIT OF BARRY HESS

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, Barry Hess, who, being known to me, and, being first duly sworn, deposes and says as follows:

My name is Barry Hess and I am a practicing attorney in the City and County of Mobile, Alabama. I represent Judge James D. Sullivan in the charges pending in the above numbered case.

I prepared a motion to dismiss the indictment in this case due to obstruction of justice. In that motion I set forth events concerninrg Carroll Ogden, a Probation Officer for the State of Alabama working in Mobile County, Alabama.

The information set forth in that motion is based on accounts given by Carroll Ogden to Judge Sullivan and others shortly after the

events described in that motion occurred. In the course of preparing for trial in this matter I retained the services of A. G. Hildreath as a private investigator. Mr. Hildreath is a retired Chief of Police of the City of Prichard, Alabama. Mr. Hildreath approached Mr. Ogden for the purpose of interviewing him. Mr. Ogden refused at that time to be interviewed and questioned whether or not Mr. Hildreath was in my employ. Subsequently I had a telephone conversation with Mr. Ogden and he agreed to a conference in my office on Janury 3, 1984. He stated that he would want to tape record the conversation, to which I told him that I had no objections. He did indicate to me in this conversation that he had been threatened and harassed by the United States.

On January 3, 1984, my office received a call from the office of Al Pennington, attorney, advising that he represented Mr. Ogden and that

Mr. Ogden would not be able to keep his appointment. On January 3, 1984, I called Mr. Pennington to see what the problem was concerning Mr. Ogden. I was informed by Mr. Pennington that Mr. Ogden had recently been threatened by the United States Attorney, Jeff Sessions, with prosecution for purgery. I asked Mr. Pennington whether or not this threat had been made subsequent to my filing the Motion to Dismiss for Obstruction of Justice. He advised me that it had, that it had been recent, and that he had only recently been employed by Mr. Ogden. He stated that he had no objection to my interviewing Mr. Ogden, but that he wanted it to be delayed until he had had an opportunity to become familiar with the pertinent facts. For this reason I have been unable to obtain the affidavit of Mr. Ogden to file with the Court in support of our Motion to Dismiss.

/s/_____
BARRY HESS

AFFIDAVIT OF GARY STEVEN McCARVER

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, Gary Steven McCarver, who, being known to me, and, being first duly sworn, deposes and says as follows:

I am Gary Steven McCarver. I was on probation in State Court for an assault conviction and had a new charge pending for assault. I was interviewed by F.B.I. Agent McFadden who accused me of paying money for fixing my pending case of assault. He threatened me with prosecution for bribing a State Judge and for lying to a Federal Grand Jury if I denied this. He told me nothing would happen to me if I cooperated. I did not pay any money to fix my case.

I told the United States Attorney, Jeff Sessions, that I did not have "a sure thing" in

my case. I told him this after he had shown me a statement written by McFadden that was not correct. Mr. Sessions gave me a disgusted look and told me that I had better tell the Grand Jury the truth.

/s/_____
GARY STEVEN McCARVER

AFFIDAVIT OF SAMUEL ROBERT GREENE, III

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, Samuel Robert Greene, III, who, being known to me, and, being first duly sworn, deposes and says as follows:

I am Samuel Robert Greene, III. I have been interviewed by F.B.I. Agent McFadden at my home at 954 Palmetto Street, Mobile, Alabama. Agent McFadden told me that I had paid $6,000.00 to fix a case in which I was a Defendant in State Court. He further told me that he would revoke my probation and charge me with bribing a State Judge and perjury before a Federal Grand Jury if I did not cooperate, but nothing would happen to me if I told the Grand Jury what he told me to say.

/s/_____
SAMUEL ROBERT GREENE, III

AFFIDAVIT OF JOYCE CHAPMAN

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, Joyce Chapman, who, being known to me, and, being first duly sworn, deposes and says as follows:

My name is Joyce Chapman and I am the wife of Cavlin Chapman. On September 27, 1983 I was contacted by F.B.I. Agent Christian, a female. She told me that she understood that I had been arrested within the last several weeks. She told me that "we are responsible for having those charges brought up against you." The charges concerned a case that I had been a defendant in that had been nol prossed in 1981. She also told me that she could help me or hurt me on these charges and help or hurt my husband. She said she wanted some information on Judge Hogan and Mr. Holloway making a deal with my

husband to pay $10,000.00 to give him probation.

I told her that there was no information that I could give her, that I did not know of any kind of deal. I told her I could not make up any lies to help myself. She kept repeating that she could help me on my cases. She kept telling me that I was lying. I told her "well, just a little blackmail to hold over my head." She then left.

F.B.I. AGent McFadden and Christian also went to my mother-in-law's home and told my mother-in-law that he could help or hurt me and help or hurt my husband.

I was also subpoenaed to appear as a witness before the Grand Jury and was told that I would be prosecuted for perjury if they could prove that I lied. I tood this as a threat implying that I should say what he wanted me to say.

/s/_____
JOYCE CHAPMAN

AFFIDAVIT OF FRANK PARKER

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority, Frank Parker, who, being known to me, and, being first duly sworn, deposes and says as follows:

I am Frank Parker and I operate a business at 5721 Old Rock Road, Mobile, Alabama. I have been interviewed by F.B.I. Agent McFadden. He told me that he had evidence that I had paid money to Dodson Fail to fix a criminal case pending against Gary McCarver. He threatened me with prosecution for bribing a State Judge and with prosecution for lying to a Federal Grand Jury if I did not cooperate with him. These allegations were not true and I ordered him to leave my place of business.

/s/_____
FRANK PARKER

APPENDIX C

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been

committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for a defense.

AMENDMENT TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.